No. 11,142

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. M. O'CONNOR, STELLA M. O'CONNOR, W. H. MORRISON and R. J. MIEDEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

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STATEMENT OF APPEAL.

Appellants appeal from a judgment of the District Court of the United States for the Northern District of California, Northern Division, awarding compensation in the sum of $1745, with interest from October 17, 1939, on that sum as "just compensation" for the possession from October 17, 1939 until September 13, 1941 of a parcel of real property containing gravel and gold, but denying compensation to them for the taking of a profit à prendre to remove gravel and gold therefrom during that period, as a part of which right, and as incident thereto, appellants were excluded from the right to mine that property for that period.

The reasons given by the District Judge for denying compensation, and as found by him were

> "that plaintiff abandoned the land subject of this action on September 13, 1941, and the land was returned to defendants at said time in the same condition as when entered upon by plaintiff * * *
>
> That plaintiff took no gravel or sand or other material from the land during the period from October 17, 1939 until September 13, 1941, or exercised any rights other than that to use and occupy the land, and there was no consequent diminution in the value of said land * * *
>
> Defendants have suffered no pecuniary loss over and above the use and occupancy of the land for the period from October 17, 1939 until September 13, 1941 * * *
>
> That no market value has been established for any of the rights originally sought to be taken and condemned in said land by plaintiff, as property separate and apart from the land itself."
>
> (T. R. p. 87.)

Appellants contend that these findings resulted from a misconception by the District Judge of the nature of the action before him, and of the nature of the right for which appellants sought compensation. The District Judge tried the case, made his findings and rendered his judgment under the misconception that he was sitting as a Court of Claims to determine the actual monetary damages which appellants sustained as a result of the limited exercise by the United States of America, respondent, of the rights and

privileges taken, rather than as a trial Court sitting to determine the cash value of the rights and privileges taken at the time that they were taken; that the findings and judgment of the District Judge disregarded uncontroverted testimony that the rights and privileges at the time they were taken had a cash value equal to the value of the fee itself; that this disregard of testimony was the result of a determination, not of injury in law when the rights and privileges were taken, but of monetary loss in fact after the rights and privileges taken had expired and respondent had, through no fault of appellants, failed to enjoy those rights and privileges to the full extent that they were taken.

This misconception on the part of the District Judge can perhaps be understood more clearly by an analysis of the pertinent facts disclosed by the evidence.

STATEMENT OF FACTS.

By Public No. 409-74th Congress, H. R. 6732, approved August 30, 1935, Congress authorized the construction of the so-called "Ruck-a-Chucky Debris Dam", which is more particularly set forth in "Rivers and Harbors Committee Document Numbered 50, Seventy-Fourth Congress". In substance, to the United States Engineers was entrusted the responsibility to thereafter (1) select a site for a debris dam on the Middle Fork of the American River, (2) design it, (3) secure contracts from hydraulic miners above the dam to store tailings behind it and pay therefor

a sum which would pay for the dam in 20 years, (4) secure the necessary materials for its construction and (5) award the contract to a civilian contractor and supervise its performance. Upon the Attorney General was cast the burden of bringing such actions under Title 33, Section 591 et seq. of the United States Code as might be warranted.

After Congress acted, the United States Engineers selected the Ruck-a-Chucky site and designed a dam at that location. (T. R. p. 95.) In their search for materials, and especially concrete aggregates, the engineers cast their eyes upon a gravel deposit located on the east half of the west half of the southeast quarter of section 23, township 13 north, range 9 east, Mount Diablo Base and Meridian. From this land they anticipated removing at least 75,000 cubic yards of sand and gravel for use as concrete aggregates (T. R. p. 106) although the exact amount, or the full extent of the gravel uses were never determined. (T. R. pp. 110, 118.)

Appellants' own certain interests in and rights to that land, the 40.34 acres of land in the counties of El Dorado and Placer, State of California, the subject of this action.

Respondent, the United States of America, brought this action October 10, 1939, pursuant to U. S. Code Title 33, Sections 591 et seq. to condemn certain interests in that land of the appellants and other defendants, of which defendants only appellants have any right or title to the property, and pursuant to U. S. Code Title 33, Section 594, obtained an order

on October 17, 1939, putting respondent in possession to thereafter enjoy those rights condemned. (T. R. pp. 38-40.)

Appellants are four, F. M. O'Connor and Stella M. O'Connor, his wife, R. J. Miedel and W. H. Morrison. (T. R. p. 90.) The O'Connors are now cotenants of an undivided one-half interest in the land itself, and R. J. Miedel is now their cotenant, owning the other half. (T. R. p. 277.) R. J. Miedel and W. H. Morrison are lessees of the sole and exclusive mining rights in the property. (T. R. pp. 58-74; 227-228.) The lease dates back to 1934, and was in effect when the action was filed. (T. R. p. 357; 58-74.) At that time the claim of ownership of F. M. O'Connor, Stella O'Connor and R. J. Miedel arose out of a mineral location claim, which ripened into a land patent August 28, 1940, after this suit was filed. (T. R. p. 277.)

The real property involved was viewed by the Court. (T. R. pp. 143-147.) It is oblong in shape, measuring approximately a half mile long from north to south, and an eighth of a mile wide, from east to west. Topographically, it is a U-shaped trough, formed by precipitous slopes along its east and west sides, and bottomed by a gravel bed approximately 500 feet wide from east to west, and extending nearly the length of the property from south to north. This gravel has been deposited there in olden times by the flow of the Middle Fork of the American River which enters the property flowing west near its northeast corner, nearly crosses the gravel deposit, and then turns abruptly to flow south just within the westerly edge

of the property (T. R. p. 363) for about a quarter of a mile, and then turns to the southeast to traverse the property and to leave it at its southeasterly corner, dividing the gravel into two bars, referred to as the "upper bar", which lies to the east of the river, and the "lower bar" which lies to the west of the river. (T. R. pp. 143-147.) In reality it is but one deposit, as the stream itself passes over gravel. (T. R. p. 225), in some places as much as twenty feet in depth. The total volume of this gravel is variously estimated from 527,000 cubic yards to 1,400,000 cubic yards (T. R. pp. 241-242), but assumed by attorney for respondent in his hypothetical questions as containing 600,000 cubic yards. (T. R. pp. 372, 424.)

This gravel varies in depth from 12 feet to 30 feet (T. R. pp. 322, 326, 392), and water permeates it at its lower depths. (T. R. p. 178.) It is a loose flowing and "free running" gravel. (T. R. p. 312.) The gravel is gold bearing throughout. (T. R. pp. 322-326; 387-410.) Drilling tests establish recoverable gold of the value of 33¢ to 35¢ per cubic yard to be contained (T. R. pp. 322-337; 387-410; 417), and tests performed by the defendants establish higher values to be present. (T. R. pp. 179-190; Def's Ex. A, B, C, D, E, F, G, H.) The highest and best use to which the property can be put is dragline dredge mining. (T. R. pp. 372, 412, 425.) It has no value for any other purpose except the removal of concrete aggregates, if there were any local demand for aggregates, which there ordinarily is not.

The value of the land itself, as mining ground, on October 10, 1939, and on October 17, 1939, was $12,000.

(T. R. pp. 382-383; 426.) It could have been mined and all of the gold removed and recovered in five to six months (T. R. p. 432), and the value of the right to take both gravel and gold for a period of one year and eleven months was also $12,000 on October 17, 1939. (T. R. pp. 411-412; 430.) The reasonable cost of recovering that gold at that time was 10¢ per cubic yard (T. R. p. 428), and a net profit to appellants in six months' time of 23¢ to 25¢ per cubic yard, or a total of $138,000 to $150,000, was reasonably to be expected. (T. R. p. 329.)

From 1934 to 1939 the property was involved in litigation. (T. R. p. 275.) As soon as this was completed the application for a patent, pending when this suit was commenced, was promptly forwarded to the United States Land Office. (T. R. p. 295.) In the meantime, appellants Miedel and Morrison had arranged for a dredge which they were prepared to purchase and install, (T. R. pp. 253-255, 281-282) but they delayed tying up their funds because respondent had threatened to preclude them from operating by taking exclusive possession by this action. (T. R. pp. 253-255, 281-282.)

They knew of this proposed exclusion because they were then negotiating with the respondent about the gravel on the land. (T. R. p. 278.) The respondent had searched the records for any claims against the land since 1850 (T. R. p. 283), and even joined all possible claimants as parties defendant, (T. R. pp. 2-37) although respondent knew that only appellants had any right to remove either gravel or gold. (T. R. p.

28.) In fact, respondent approached appellants to negotiate a purchase of gravel. (T. R. pp. 278-279.) Any royalty proposition was not acceptable, (T. R. p. 279) nor would respondent limit the right which it sought either as to quantity, area or depth. (T. R. pp. 207-212, 280, 282-284.) It asked for a price or terms under which it could, (1) take any quantity, (T. R. pp. 226-227), (2) take from any location, (3) take from any depth, (4) exclude appellants from recovering gold from anywhere on the property except as a corollary of the gravel extraction process, (T. R. p. 283) and, (5) that such rights and exclusions endure for two years. (T. R. pp. 207-212, 215-222, 280-284.)

These negotiations culminated in a series of three letters in which the appellants Miedel and Morrison offered the respondent the rights it sought for the payment of $11,875, plus the obligation of respondent to furnish excavation, and elevation to the gravel removed, and water and power to operate gold recovery devices, and to remove the tailings from appellants' plant. The representatives of respondent "shook hands" with appellants on this deal, subject to confirmation from Washington, D. C. and authority to enter a consent decree accordingly. (T. R. pp. 251-252.)

Considerable time elapsed, during which respondents advertised for bids for the construction of the Ruck-a-Chucky Debris Dam by a contractor who should have access to appellants' gravel under the terms informally agreed, namely that the contractor furnish the exca-

vation and elevation of the gravel, the state water and power, and remove the tailings. (T. R. p. 215.) The contract was then awarded and the contractor desired possession of appellants' property. Since no formal agreement had been reached, condemnation and immediate possession was a necessary step.

To meet this emergency the respondent filed the complaint herein, setting forth that respondent is authorized, under U. S. Code, Title 33, Section 591, Public No. 409-74th Congress, H. R. 6732 and Rivers and Harbors Committee Document Numbered 50, Seventy-Fourth Congress,

> "to acquire by purchase and condemnation any estate, right, title and/or interest in and to the real property * * * for the purpose of for a period of two years from and after the time of the granting and entry of an Order by this Court granting the United States of America immediate possession of said land, removing concrete aggregates therefrom and from out the same and for the purpose of exercising such other rights therein and thereto as may be incidental to the construction of the Ruck-a-Chucky Dam and Reservoir." (T. R. p. 5.)

and that the Secretary of War has selected for acquisition by condemnation,

> "A right of uninterrupted use and occupancy of the land hereinafter described for a period of two years from and after the granting and entry of an order by this Court granting to the United States of America immediate possession of said land, for the purpose of, during said period of two years, removing concrete aggregates such as sand

> and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found to be expedient and proper in the carrying out of said project, and for the purpose of exercising such other rights therein and thereto during said period of two years as may be incidental to the construction and maintenance of said Ruck-a-Chucky Dam and Reservoir." (T. R. pp. 6-7.)

Then follow certain provisions for the recovery of gold content of the gravel, hereinafter more specifically discussed, and concludes that the Secretary of War has further designated in the selection of the rights for acquisition:

> "That in the event said owners * * * shall fail or refuse to carry out the requirements last above set forth, at the time required by the Chief of Engineers, United States Department of War, then and in that event, *plaintiff shall have the option to either take the said concrete aggregates without recovery of gold contents thereof,* if any there be, or to carry out the requirements so failed or refused by the said defendants." (Italics ours.) (T. R. pp. 9-10.)

The complaint continues with the allegation:

> "That the estate or interest in and to the said land * * * which the plaintiff intends to seek, take, acquire, condemn, hold and own by these proceedings." (T. R. p. 11.)

is the same right selected by the Secretary of War and herein immediately above set forth at length.

The complaint further sets forth that adequate funds are available to pay any award that may be made in the action out of an approved appropriation (T. R. p. 12), and that pursuant to U. S. Code, Title 33, Section 594, respondent is entitled to immediate possession of the land to the extent of the interest to be acquired (T. R. pp. 13-14), and that necessary formalities have been indulged to entitle respondent to an order for immediate possession. (T. R. p. 15.)

In addition to a prayer that the interest herein above described at length be awarded to respondent, the complaint contains the additional prayer that:

> "such right, power, and privilege of use and occupancy of said land and the removal of concrete aggregates from and out of said land to be uninterrupted during said period of two years, free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy by the United States of America, and all thereof for the purposes aforesaid.
>
> That the Court adjudge and decree that whatever right or interest each or all of said defendants may have in and to said land be held in abeyance, and particularly each their right to the mining of said land, be held in abeyance for and during the said period of said use and occupancy of said land sought to be acquired herein shall continue, and that the Court likewise adjudge the value of any detriment suffered or to be sustained by said defendants, and each of them, by reason of such use and occupancy by plaintiff, and such holding in abeyance of any such rights that each said defendant, or any of them, may have to mine

> said land as aforesaid, and that the award therefor when made and paid by plaintiff herein be adjudged and decreed to be the full and just compensation for the taking of said use and occupancy, as aforesaid."
>
> (T. R. pp. 32-33.)

To enable its contractor to take possession and commence operations at once, respondent petitioned the Court for, and the Court gave and made its order in these words:

> "Now, Therefore, It Is Ordered, Adjudged and Decreed that the plaintiff be and it is hereby entitled to and shall be given immediate possession and use of the land described in the complaint herein, and hereafter described, and plaintiff is hereby authorized to take possession of said land to proceed with the public work thereon authorized by Congress and directed by the Secretary of War and the Attorney General of the United States in the manner as set forth in said complaint."
>
> (T. R. pp. 38-39.)

Thereupon the contractor, armed with a copy of this order, took over the property (T. R. pp. 195-197, 205-206), stacked lumber on it, stored powder on it, cut and installed power poles and strung a power line (T. R. pp. 197-204; Def. Exs. I, J, K, L), took a small amount of gravel (T. R. pp. 256, 260, 271-272), and placed a lock on the gate, enabling only the contractor access to the property except appellant Morrison was given access to a cabin located thereon. (T. R. p. 206.)

Properly regulated, the excavation and elevation, the water and power, and the removal of tailings had a monetary value to appellants of ten cents per cubic yard (T. R. p. 222) if production was limited to 100 cubic yards per hour (T. R. pp. 221-223), but it was impossible for appellants to realize this value, or avail itself of the advantages contemplated because the contractor refused to restrict his output to a rate which the water and power furnished would handle. (T. R. pp. 223-224.) Therefore appellants could not, and would not meet the conditions set forth in the complaint:

> "that in the process of removing said concrete, aggregates from and out of said land for the purposes and as aforesaid provision for recovery of the gold contents of such material be made, upon terms, conditions, and in the manner as follows:
>
> The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard ¼" screen and a vertical drop of not more than 8 feet for material which is retained on a standard ¼" screen but passes a standard 1" screen, said gold recovery devices to be furnished, installed, and operated by the owner, and, except as specifically indicated below, without cost to the United States of America.
>
> (A) All material will pass a standard 1" screen to be segregated by the United States of America into two sizes and delivered to the gold recovery devices by force of gravity from screen or trommel in such a manner that no material

amount of gold is lost before delivery. Separate sizes to be delivered to the top of the gold recovery devices are as follows:

(a) All material which will pass a standard ¼″ screen;

(b) All material which is retained on a standard ¼″ screen but passes a standard 1″ screen.

(B) Sufficient water to be delivered by the United States of America to the top of the gold recovery devices for their efficient operations, such amount not to exceed 2,100 gallons per minute.

(C) Sufficient electrical energy to be delivered by the United States of America to the gold recovery devices for their efficient operation, such amount not to exceed 20 horsepower of connected load.

(D) Material returned from the gold recovery devices to be removed by the United States of America at such a rate as will prevent clogging or backing up to such an extent as would interfere with the operation of the gold recovery devices.

(E) All machinery, plant, buildings, etc., to be removed by the United States of America from said property within 120 days after acceptance from the contractor of the completed dam by the United States of America.

(F) Any and all roads on the property which are used in the construction of the Ruck-a-Chucky Dam to be returned to the above mentioned owner at the expiration of the easement in as good condition as when the Government's operation began.

The above provisions to be subject to the owner conforming to the following stipulations:

(1) The owner to operate the gold recovery device in such a manner and at a rate that the prime purpose of the sand and gravel plant, i.e., the production of cleaned, well-graded sand and gravel, will not be retarded.

(2) If the owner elects to exercise his privilege of extracting the gold and other precious metals from the materials disturbed by the United States, he is to furnish, install, and operate gold recovery devices which will require vertical clearances as follows:

(a) A vertical drop of not more than 20 feet for material which will pass a standard ¼″ screen.

(b) A vertical drop of not more than 8 feet for material which is retained on a standard ¼″ screen, but passes a standard 1″ screen.

(3) The owner to return all material, after the removal of gold and other precious minerals therefrom by force of gravity, at the same rate and of the same consistency as delivered to the gold recovery devices, with a loss of not more than 5 percent."

(T. R. pp. 7-9.)

thus nullifying the option given to appellants, and bringing directly into being the alternative provided:

"That in the event said owners, R. J. Miedel, F. A. O'Connor and Stella O'Connor, shall fail or refuse to carry out the requirements last above set forth, at the time required by the Chief of Engi-

neers, United States Department of War, then and in that event the plaintiff shall have the option to either take the said concrete aggregates without recovery of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants."

(T. R. pp. 9-10.)

Had it been possible to correlate the gravel separating plant with the gold recovery plant, and had construction proceeded as planned, the proposed cash consideration plus the obligations upon the contractor to excavate and elevate the gravel, furnish water and power, and remove the tailings would have resulted in a recovery to the appellants of $34,000 in gold from the property without cost to them. (T. R. p. 429.) It would have absorbed what otherwise would have been an expense to appellants of $10,000 to process that same gravel in order to recover that gold.

Had the respondent not obtained the order for immediate and exclusive possession and taken over appellants' property, appellants would have mined said property in a period of six months, and, during the time they were excluded from possession would have effected a net recovery, over and above the expenses of operation of $138,000 to $150,000. By deferring this recovery for one year and eleven months appellants have lost interest on that amount at 7%, or $18,515 to $20,125.

After hearing all the evidence, and the offers of proof, the Court awarded $1745 damages (T. R. p. 89) for the bare possession of the property (T. R. pp. 87,

88), nothing at all for the incorporeal right to take gravel from October 17, 1939 to September 13, 1941 (T. R. p. 87), and nothing at all for the taking of the right to mine the property during that period. The reason assigned for awarding no recovery for the incorporeal right to take gravel was that none was in fact taken (T. R. p. 87), and that no market value was established for the value of the original incorporeal rights sought to be taken apart from the value of the land itself. (T. R. p. 87.) No reason was assigned for allowing no recovery for the deprivation of the right to mine.

ANALYSIS OF THE RIGHTS TAKEN.

In appealing, no attack is made upon the award of the Court for the bare possession of the property. In so far as the right of bare possession is concerned, the award was more than fair. Although no appeal has been taken therefrom, appellants hereby agree that if this Honorable Court reverses the judgment of the district judge because of his failure to award compensation for all of the rights taken from appellants, that portion of the judgment may also be set aside and a revaluation made *in toto*.

Appellants assign as error the failure to render any judgment in favor of appellants for the right, during one year, ten months, and twenty-seven days, to take gravel and gold from their property.

Stripped of unnecessary verbiage, the respondent sought

> "the right * * * for * * * two years from the * * * entry of an order * * * granting * * * possession * * * of taking * * * concrete aggregates * * * in * * * the construction of said * * * project, and * * * such other rights * * * as may be incidental * * * free from any right * * * of * * * defendants * * *"
>
> (T. R. pp. 11-12.)

In the exercise of this right respondent proposed to enter upon appellants' property and remove gravel, and, if necessary

> "take * * * aggregates without recovery of gold"
>
> (T. R. pp. 9-10.)

This language permits but one interpretation, and that is, if appellants could not save the gold, and the evidence established that they could not (R. T. pp. 223-224), respondent might take such gravel and sand, with gold, as they desired for the construction and maintenance of the dam. By the complaint, and by the order, no limitation was placed on the quantity. Without in any way violating the language of the complaint or the language of the order giving it possession and starting the two year period, respondent could have removed and used every scrap of gravel and gold from appellants' property.

A legal analysis of the right taken,

> "The right for two years from the entry of an order granting possession of taking concrete aggregates in the construction of said project and such other rights as may be incidental, free from any right of defendants, and to take aggregates without recovery of gold"

shows that it was what is in law termed a profit à prendre, and that by its terms it commenced to run October 17, 1939, and continued until September 13, 1941. During any of that period had respondent built the proposed dam, it could have exercised that right to its fullest extent. Looked at as a profit à prendre, respondent did not acquire any physical gravel, not one pebble. Instead it acquired an incorporeal right to enter upon the property and take gravel.

The rule of "profit à prendre" which is the right to take something out of the soil of another as a right of common and also some minor rights as a right to fish, hunt, and hawk, or to mine metals, dig for oil or take oil from the land, applies to extraction of gold.

Gold Mining & Water Co. v. Swinnerton, ... Cal. App. (2d) ....., 121 P. (2d) 840, 843.

"Profits à prendre" consists of a right to take a part of the soil or product of the land of another in which there is a supposed value.

U. S. v. 1070 Acres of Land, 52 F. Supp. 378, 380.

"Profit à prendre" is defined to be the right of taking soil, gravel, minerals, and the like from the land of another.

Black v. Elkhorn Mining Co., 49 Fed. 549, 551;

Payne v. Sheets, 75 Vt. 335, 55 Atl. 656;

Munsey v. Mills & Garrity, ... Tex. ....., 283 S. W. 754, 759;

Trimble v. Kentucky River Co., 235 Ky. 301, 31 S. W. (2d) 367;

Santa Rita Co. v. Board of Equalization, 101 Mont. 268, 54 P. (2d) 117, 127;

Waller v. Dwellee, 187 Iowa 1384, 175 N. W. 957, 960.

"Profit à prendre" creates interest in realty in nature of covenant running with the land, distinguished from personal obligation of the owner.

Richfield Oil Co. v. Hercules Gas Co., 112 Cal. App. 431, 297 Pac. 73, 75.

It carries the right of entry and right to remove from lands designated products, "profits".

Richfield Oil Co. v. Hercules Gas Co., 112 Cal. App. 431, 297 Pac. 73, 75.

The principal feature of a profit à prendre is that it is an interest or estate in the land itself which distinguishes it from a pure "easement" which is a right or interest without profit, there being in case of an easement an absence of all right to participate in the profits of the soil charged therewith.

Richfield Oil Co. v. Hercules Gas Co., 112 Cal. App. 431, 297 Pac. 73, 75.

An "easement" and a right to "profit à prendre" each is incorporeal real property, involving possession for use of land, the title and the broader right to possession of which is in another, the distinguishing feature of profit à prendre being the right to take from the land part of the soil or a product of it, and of an easement being the absence of all right to participate in the profits of the soil.

Saratoga Corpn. v. Pratt, 227 N. Y. 429, 125 N. E. 834, 838.

An oil and gas lease for Oklahoma land containing usual provisions creates in lessee a present interest or estate, which is an incorporeal hereditament, sometimes called a "profit à prendre".

Francis v. Superior Oil Co., 102 F. (2d) 732, 734.

An oil lease for an indefinite term or for a term of years and as long thereafter as oil or gas may be found in the land, creates in lessee a "profit *à prendre* in gross".

Payne v. Callahan, 37 Cal. App. (2d) 503, 99 P. (2d) 1050, 1056;

Dutton v. Interstate Invest. Co., ... Cal. App. (2d) ....., 113 P. (2d) 492, 494;

Phillips v. Bruce, 41 Cal. App. (2d) 404, 106 P. (2d) 922, 924;

Tanner v. Title Ins. & Trust, 20 Cal. (2d) 814, 129 P. (2d) 383, 386;

Dallapi v. Campbell, 45 Cal. App. (2d) 541, 114 P. (2d) 646, 650;

LaLugana Ranch Co. v. Dodge, 18 Cal. (2d) 132, 114 P. (2d) 351, 353, 354;

United States v. Stanolined Company, 113 F. (2d) 194, 198;

Lever v. Smith, 30 A. C. (2d) 667, 87 P. (2d) 66, 68;

Austin v. Hallmark Oil Co., 21 Cal. (2d) 718, 134 P. (2d) 777, 785;

Romero v. Brewer, 58 Cal. App. (2d) 759, 137 P. (2d) 872, 874;

Richfield Oil Co. v. Hercules Gas Co., 112 Cal. App. 431, 297 Pac. 73, 75;
Dabney-Johnston Corp. v. Walden, 4 Cal. (2d) 637, 52 P. (2d) 237.

While the complaint designates the right taken by the Government as an "easement", it is not, technically, an easement. An easement is a privilege without profit. A right by which one person is entitled to remove and appropriate for his own use any part of the soil belonging to another, or anything growing in or attached to or existing upon the land, for the sake of the benefit to be gained of the property thereby acquired in the thing removed, has always been considered in law a definite species of right distinct from an easement and is commonly called "profit à prendre". A conveyance of land with a mill and dam thereon, granting use of a gravel pit located on other lands of the grantor, for making repairs necessary to the dam, has been held to give the grantee the right to remove the necessary gravel for repairing the dam, being a "profit à prendre", and although in some respects like an easement, technically not an easement.

Walker v. Dwellee, 187 Iowa 1384, 175 N. W. 957, 958.

An examination of the history of the Ruck-a-Chucky Dam shows conclusively that the respondent intended, rather than to buy gravel, rather than to limit the amount of gravel to which it would be entitled to remove, to take the absolute right to remove from

appellants' property an indefinite amount of gravel, even to take and use the entire deposit, if necessary.

Public No. 409—74th Congress, H.R. 6732, approved August 30, 1935, and Rivers and Harbors Committee Document Numbered 50, Seventy-Fourth Congress provided for *a dam*. The location, size, cost, and structural material were not specified. These were details, by the terms of those two enactments, left to the United States War Department Engineers. These were not worked out until May of 1939.

> "Q. Who was the engineer in your office who estimated the cost of construction of this dam?
>
> A. All of those estimates were prepared under my direction.
>
> Q. Your supervision?
>
> A. That is correct.
>
> Q. They were made about when?
>
> A. About May, 1939."
>
> (T. R. p. 96.)

When, after examination, the engineers determined that the site originally selected was no longer usable, the project was not abandoned. Instead, the engineers looked elsewhere for a new site for the same dam that Congress had already authorized in the year 1935.

> "A. It was along in May—I forgot the exact date—in May of 1940, that the portal of that exploratory tunnel was uncovered.
>
> Q. Was it afterwards determined by the War Department that it would be necessary to select another site?
>
> A. It was.

Q. And did you figure on selecting a site near there downstream or upstream?

A. At first we explored a site downstream, about a mile downstream from the original site, and we spent some months in diamond-drilling and tunneling in that area * * * further exploratory work was then continued upstream from the site at which the last slide occurred, and four sites in that locality were mapped and preliminary geological explorations made to determine the most feasible locality.

Q. And was a determination made?

A. Yes.

Q. About when?

A. About November, 1940, or December, 1940."

(T. R. pp. 108-109.)

In casting about for a new location, at all times the engineers intended to exercise their profit à prendre in appellants' land, had it been convenient for them to do so.

"Q. Mr. Goodall, you considered—your office considered that wherever that dam was built on this river, it was still the same project, did you not?

A. We did.

Q. And it was your intention at all times while you were looking for another site, to use as much of these concrete aggregates as you might see fit to use for the construction of any dam, wherever it might be on this river?

A. That would depend on where the dam was built, and the type of dam finally chosen in an alternate site.

Q. Let me put it this way: that it was your intention, when you looked at and examined the site downstream from the original site, to use this gravel if you built a concrete arch there?

A. That is correct.

Q. And it was your intention, if you selected a site where this gravel is more available than any other gravel, and you required any concrete aggregates, to use this gravel, was it not?

* * * * * * *

Mr. McMillan. I offer that objection, on the ground it is too speculative and remote.

The Court. The objection is sustained.

* * * * * * *

Q. Now, those investigations to determine the site were made pursuant to this same Act of Congress authorizing the construction of the Ruck-a-Chucky Dam, were they not?

A. Yes.

Q. Are you able to tell at this time, had the second site been selected, the number of yards of concrete aggregates that would have been required for the construction of that dam?

Mr. McMillan. I object to that, may it please your Honor, on the ground it is purely speculative, too remote, and necessarily this engineer has made no mistake at all with reference to these later sites.

Q. You have made no estimates with reference to that, have you?

A. We made an estimate of the lower site.

Q. But it was never selected, as I understand?

A. No, because it cost too much money."

(T. R. pp. 118-120.)

Appellants assign as error the refusal of the district judge to allow the witness to answer the questions above set forth. It is urged that a truthful answer would have shown that from May, 1940, to December, 1940, the amount of gravel that would have, or might have, been taken, under and pursuant to the profit à prendre taken by condemnation, was uncertain and indefinite.

Instead of permitting appellants to show, fully, the uncertainty of the amount of gravel withdrawable under the profit à prendre so taken and condemned, the district judge permitted respondent to prove, over appellants' objection, that the extent of intended exercise and enjoyment of a profit à prendre so taken and condemned, was definitely limited.

> "Q. Was it estimated, the quantity of gravel concrete required in the construction of that dam?
>
> Mr. Cornish. Just a moment.
>
> If the Court please, I object to that on the ground it is incompetent, irrelevant and immaterial. I refer your Honor to the complaint, and in the complaint it sets forth that the Government is condemning the right, for a period of two years, to take gravel from this property for use in the construction, or incidental to the construction of this project. Nowhere in the complaint is the amount of gravel which the Government thought, at the time, it might take, set forth, and in no wise in the complaint does the Government limit itself as to the amount that it would take from the property * * *
>
> (Argument followed.)

The Court. The objection is overruled. Proceed."

(T. R. pp. 97 and 106.)

To further impress the exact nature of the right so taken and condemned, and to conclusively establish its unlimited character, again appellants refer to the record. Without prolonging this brief by quotation at length, these significant facts appear in the testimony:

FIRST: Respondent approached appellants for the purpose of negotiating a purchase of appellants' gravel. (T. R. pp. 278-279.)

SECOND: Appellants offered to furnish respondent with gravel, to be paid for as delivered, on a royalty basis, thus offering to sell a tangible product of their land, not offering to sell an incorporeal profit à prendre in their land. (T. R. p. 279.)

THIRD: A sale of gravel was not acceptable to respondent. (T. R. p. 279.)

FOURTH: Respondent sought to negotiate a cash price for which it would receive:

(a) A profit à prendre to take gravel and sand from appellants' property;

(b) That said products could be taken from any place over the area of appellants' land, and from any depth;

(c) That the amount to be taken be not limited;

(d) That appellants refrain from mining their land for two years to allow respondent full, complete, unobstructed possession and use

> of the land, save only to recover the gold from the gravel as a corollary to the process of removing the gravel and sand.
>
> (T. R. pp. 207-212, 215-222, 226, 227, 280-284.)

The rights taken by respondent are defined in the complaint. As so defined, we have seen, they amount to a profit à prendre, unlimited as to the extent of the privilege of exercise. All of the surrounding circumstances clearly show a deliberate intent that the extent of the respondent's right should be unlimited for its two year duration.

> "The Tennessee rule is that the compensation to be paid the owner is to be upon the assumption that the easement will be enjoyed to its fullest extent. That appears to be the Tennessee rule, and it is also the federal rule, except under the federal rule the just compensation to be paid the landowner turns upon the question of the effect the enjoyment of the easement to its fullest extent will have upon the cash market value of the property upon which the easement is imposed. Under either rule, whether the loss to the owner is to be paid for as damages inflicted by the imposition of an easement or by way of just compensation for the thing taken, the result should be the same if the market value of the property before and after the imposition or taking is used as the measure of loss or damage. The question is, how does the easement affect the market price of the property * * *. Specifically if the imposed easements leave the property less marketable because as to some of it the owner of the fee or servient estate cannot use it at all or cannot use

> it as effectively or profitably, the Commission will, from the material facts before it, determine the extent to which the inability to use the property upon which the easement is imposed at all or in parts, affects the fair cash market price of the whole. The adverse effect upon the market price, that is, the amount the imposition of the easement has reduced it, will constitute the just compensation due the owner."
>
> *United States v. Indian Creek Marble Company,* D.C.E.D. Tenn., 40 F. Supp. 811, 821.

In the interpretation and definition of the right so taken and condemned, that provision was made as above set forth for the saving of the gold by appellants cannot in any wise narrow the broad and unlimited right taken. Those safeguards were based upon an hypothetical rate of production of 100 cubic yards per hour (T. R. pp. 221-223) and since the respondent saw fit to eliminate any restriction of maximum rate of production of sand and gravel, these "safeguards" were of no value, and did not, and could not, enable appellants to recover the gold. (T. R. pp. 223-224.)

Therefore, for the purpose of placing a value upon this profit à prendre so taken and condemned by respondent, it must be interpreted in its broader significance, as the right to enter upon appellants' property and rights, mine the entire property, had respondent seen fit to do so, as long as in so doing respondent was producing gravel for the construction and/or maintenance of the Ruck-a-Chucky Dam, and, in addition thereto, had respondent elected, stockpiling all of the

gravel in the appellants' land in that period of two years that it would ever need in the construction or maintenance of the Ruck-a-Chucky Dam, thereby removing and retaining all of the gold, which respondent's witness, Arthur F. Bishop, testified was present and recoverable in quantities at the rate of 34.1¢ per cubic yard (T. R. p. 417), and, on respondent's witness' testimony of quantity present, 535,000 cubic yards (T. R. p. 362), removing, retaining and keeping gold of the value of $182,435.

FINDING NO EVIDENCE OF VALUE OF INCORPOREAL RIGHT NOT SUSTAINABLE.

The district judge made his finding

> "That no market value has been established for any of the rights originally sought to be taken and condemned in said land by plaintiff, as property separate and apart from the land itself."
>
> (T. R. p. 87.)

In making this finding, the district judge disregarded the testimony of two of the witnesses called by respondent for the purpose of establishing values.

After testifying that the highest and best value to which the land could be put was dredge mining, and that its reasonable market value for that purpose on October 17, 1939 was $12,000, Mr. Arthur F. Bishop testified:

> "Q. And in your opinion, Mr. Bishop, that property is of no value for anything but mining, is it?

A. That is my opinion.

Q. As a cabin site, as a farm, as a ranch, as a place for pasturing cattle, it would have practically no value?

A. No, sir.

Q. Now, what, in your opinion, Mr. Bishop, would be the reasonable value, the fair market value of the privilege of going onto this property without any interference from anyone, for a period of one year and eleven months, and remove gravel or any other minerals that might be found on the property during that period?

A. Would you repeat that question for me, please?

Q. Mr. Cornish. Read the question, please.

The Court. The reporter will read the question.

(Question read by the reporter.)

A. Well, if I would be going on the property I would be going on there with the idea of mining, and on account of the high speculative hazard there I wouldn't give any more than that.

Mr. Cornish. Q. I beg your pardon?

A. I wouldn't give any more than that amount of money.

Q. In your judgment the property could be completely mined in a year and eleven months, couldn't it?

A. Yes.

Q. And from what you found from your test, be mined at a profit?

A. I believe so. That is my opinion.

Q. And from your knowledge of the middle fork of the American River, the gravels on this property are considerably higher in gold content than the gravels on the stream below—or don't you know that?

A. You mean the position of this property as regards the American River, or——

Q. The gravels on this particular bar have a higher gold content than the gravels on the middle fork of the American River to the south and southwest of this property?

A. Well, I don't know about that. I couldn't answer that.

Q. You don't know about that?

A. No, I couldn't answer that question.

Q. But you would feel that from twelve to thirteen thousand dollars would be a fair price to pay for the privilege of taking gravel, or any other minerals, off this property for a period of one year and eleven months?

A. That is my opinion.

Q. And in your opinion the mining of this property, the taking of the minerals from this property, is the highest and best value or use to which the property could be put?''

(T. R. pp. 411-412.)

Similarly, respondent's witness Richard G. Smith, after similarly testifying that on October 17, 1939 the highest and best use to which the land could be put was dredge mining and that for that purpose it had a reasonable market value of $12,000, testified as follows:

''Q. Now, in your judgment, Mr. Smith, if you owned this property, and someone came to you and said that they wanted the exclusive right, independent of any interference from you, to remove gravel from this bar for a period of one year and eleven months, and to take such other minerals as they may see fit, what in your opinion would be a fair compensation to pay to you as the owner of

that property for that right, given on the 10th of October, 1939, and to extend for a period of one year and eleven months thereafter?

A. $12,000.

Q. In other words, you feel that in that time that they could take out everything that was in the property?

A. That is right."

(T. R. p. 430.)

By this testimony specifically, and by other testimony running throughout the record, it was established that the appellants' land was valuable for only one purpose, dredge mining, and that it could reasonably and economically be mined out in less than one year and eleven months. Therefore, it logically follows, for the reasons explained by respondent's two witnesses, that the full exercise of the profit à prendre so taken and condemned by respondent was the equivalent of the full enjoyment of the fee itself, and, for that reason, the profit à prendre, so taken and condemned by respondent, had the same value as the fee.

The finding of the District Judge was therefore erroneous.

THE INCORPOREAL PROPERTY A PRENDRE WAS TAKEN, AND VESTED OCTOBER 17, 1939.

This action was brought under the provisions of U. S. Code, Title 33, Section 591. That section, in turn, provides that the proceedings shall be in conformity with the laws of the State in which the action is brought, in this case, the laws of California. In

construing Section 591, Title 33, U. S. Code, it has been held that the state statute prescribing the time that title vests is controlling.

Empie v. United States, 131 F. (2d) 481.

Appellants concede that it is the California rule that title does not vest in the condemnor until the money is paid, and that the money was not paid in this case. There is no doubt but that, had respondent condemned any given amount of gravel, the title to the gravel would not have passed, no compensation having been paid, and that even the entry into possession of the tangible gravel condemned would not have vested the title in respondent.

But appellants earnestly contend that it was not the purpose of Congress, in adopting U. S. Code Title 33, Section 591, that the state law of eminent domain should be controlling over any express enactments of Congress, especially over U. S. Code, Title 33, Section 594, or over the Constitution of the United States of America.

The complaint sets forth:

> "That adequate funds are available for paying any and all awards that may be granted herein to any of said above named defendants or to anyone having any interest in and to said land, from an appropriation for maintenance and improvements of existing works for Rivers and Harbors, Act approved July 19, 1937."
>
> (T. R. p. 12.)

The purpose of this allegation was to give the District Court jurisdiction to make an order placing re-

spondent in immediate posesssion. That order (T. R. pp. 38-40) was made by the District Court pursuant to U. S. Code, Title 33, Section 594, which requires, as a precedent to such an order:

> "Provided, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the Court in which such proceedings shall be instituted."
>
> U. S. Code, Title 33, Section 594.

The complaint did not ask for a general two-year privilege, but asked for a right for a specific period:

> "of two years *from and after the time of the granting and entry of an order by this court, granting to the United States of America immediate possession of said land* * * *" (Italics ours.)
>
> (T. R. p. 11.)

As authorized, as defined in the complaint, and as determined by the order of the District Court (T. R. pp. 38-40), this incorporeal profit à prendre, so taken and condemned by respondent was to start October 17, 1939, and on no other date.

The statute authorizing the entry into possession provides in part:

> "* * * the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands,

> easements, or rights of way, *to the extent of the interest to be acquired,* and proceed with such public works thereon as have been authorized by Congress * * *" (Italics ours.)
>
> U. S. Code, Title 33, Section 594.

To hold that this intangible, incorporeal, profit à prendre, for a two-year period to commence October 17, 1939, did not vest because the purchase price had not been fixed and determined, and paid, would do violence to the express wording and spirit of the federal statute. For how could respondent take possession of an incorporeal right, to start at that instant, to its full extent, and proceed to use it, without that right "vesting" in respondent? To fix any day of vesting of that right other than October 17, 1939 would have deprived the respondent of the privilege of the statute. To that extent, therefore, the federal statute must control.

Under that statute respondent had the right to exercise the incorporeal profit à prendre from October 17, 1939 to September 13, 1941, appellants could not have prevented the enjoyment, during that period, to the fullest extent the right was defined by the complaint. In the humble opinion of appellants, nothing more was necessary to vest that right.

Thus, by paramount public right, here, respondent seizes (1) possession of 40.34 acres of ground, (2) the right for two years to remove gravel and gold therefrom for use in the construction and maintenance of the Ruck-a-Chucky Dam, and (3) the right during

that period to mine that property. These were the particular interests in that land that suited respondent's purpose. This it may do. But in so doing, it must pay just compensation therefor. It must pay what is just for the special type of character of interest which it sees fit to acquire.

It is well settled that the government may acquire for public purposes such property as it may select; it may take such interest in or use of property as it may determine; it may fix the term of use; it may use the property for any purpose. These powers are executive.

Monongahela Navigation Co. v. United States, 148 U. S. 312, 37 L. Ed. 463, 13 S. Ct. 622;
United States v. New River Collieries, 262 U. S. 341, 67 L. Ed. 1014, 43 S. Ct. 565;
United States v. Meyer (7th Cir.), 113 F. (2d) 387.

The extent and exercise of such powers is not of judicial concern. But what compensation shall be awarded and the rules and standards applicable thereto is solely a judicial function.

Monongahela Navigation Co. v. United States, 148 U. S. 312, 37 L. Ed. 463, 13 S. Ct. 622.

It is not only the province but the duty of the Court to see to it

> "that private property shall not be taken for public purposes without just compensation."
>
> Constitution, Amendment V.

DISTRICT JUDGE'S FINDING NO DAMAGE SUFFERED IS NOT SUSTAINABLE.

As a further reason for denying to appellants compensation for the taking of this profit à prendre, the District Judge made these additional findings:

> "That plaintiff abandoned the land subject of this action on September 13, 1941, and the land was returned to defendants at said time in the same condition as when entered upon by plaintiff. * * *
>
> That plaintiff took no gravel or sand or other material from the land during the period from October 17, 1939 until September 13, 1941, or exercised any rights other than that to use and occupy the land, and there was no consequent diminution in the value of said land. * * *
>
> That defendants have suffered no pecuniary loss over and above the use and occupancy of the land for the period from October 17, 1939 until September 13, 1941."
>
> (T. R. p. 87.)

Appellants admit that on September 13, 1941, respondent filed an abandonment. (T. R. pp. 73-74.) Appellants further concede that by that abandonment, respondent returned to appellants, unused, the last one month and four days of the two-year period for which the profit à prendre was originally taken and condemned. But appellants contend that it had no other or further significance. As we have just pointed out, the profit à prendre so taken and condemned, vested in respondent on October 17, 1939, and re-

mained vested until September 13, 1941. During that period respondent had the right to enjoy it to its fullest extent. By its nature, it was not tangible. By its nature, it was used up and consumed, day by day, until on September 13, 1941, only one month and four days of the right could, by the nature of things, be abandoned back to appellants. The expired and consumed one year, ten months and twenty-seven days of that intangible right and privilege could no more be abandoned back to appellants, than could respondent have condemned a building for destruction, destroyed it and then, after it had been destroyed, abandoned back the ashes.

The District Judge tried the case, and received evidence, and made his findings, on the theory that the abandonment changed the nature of the case, and controverted it into a damage claim, comparable to an action in the Court of Claims for something wrongfully taken, and that the proceeding before him was no longer a condemnation action to fix the reasonable value of the property lawfully taken by respondent from appellant for a public use. Appellants submit, it was not only the province but the duty, of the District Judge to see to it

> "that private property shall not be taken for public purposes without just compensation,"
>
> Constitution, Amendment V.

in accordance with the rules laid down by the Courts for the fixing of damages in a condemnation proceeding.

In a condemnation proceeding it is the rule that the owner of private property, taken and condemned for a public use, is entitled to the value of the property taken for public use, and that the value be fixed as of the time of taking.

Olson v. United States, 292 U. S. 246, ... L. Ed. ....., ... S. Ct. .....;

United States v. Klamath and Modoc Tribes, 304 U. S. 119, 82 L. Ed. 1219, 58 S. Ct. 799;

Danforth v. United States, 308 U. S. 271, 84 L. Ed. 240, 60 S. Ct. 231;

United States v. Miller, 317 U. S. 369, 87 L. Ed. 336, 63 S. Ct. 276.

The case last cited is of particular interest, because there the Supreme Court held that the property was taken when the project was planned, not when the declaration of taking was filed, and refused the property owner a known increase in value between the time of the "taking" and the time of filing of the declaration of taking.

If the land owner is not entitled to appreciation of value after the taking, no more must he suffer from depreciation in value after the taking.

Notwithstanding, over appellants' objection the District Judge admitted evidence, relating to the value of the profit à prendre so taken and condemned, tending to depreciate the value, and to show the extent of enjoyment of the profit à prendre, so taken and condemned, all pertaining to things and events occurring after the taking.

"Q. * * * Now, let me ask you, do you know whether or not any gravel was taken?

Mr. Cornish. Objected to, if the Court please, as incompetent, irrelevant and immaterial.

The Court. The objection is overruled. Proceed.

Mr. McMillan. Q. Whether or not any gravel whatever was taken in the furtherance of this suit in the construction of the Ruck-a-Chucky Dam?

A. There was none.

Q. None whatever?

A. That is right.

Q. * * * Did the plaintiff ever construct the Ruck-a-Chucky Dam?

A. No."

(T. R. p. 107.)

Based upon the foregoing testimony, the District Judge made the above findings, which appellants insist are prompted by a misconception of the case before him, and should not have been made. Although perhaps proper had this been a suit in the Court of Claims for actual damages suffered, they were not proper in a condemnation suit, nor under the rule laid down in

United States v. Miller, 317 U. S. 369, 87 L. Ed. 336, 63 S. Ct. 276.

It must be remembered that the interest in appellants' land so taken and condemned by respondent, was not a corporeal interest, but an incorporeal profit à prendre; not tangible gravel, but *the right* to take gravel and gold.

In an article entitled "Abandonment of Interests in Land", in 25 Ill. L. R. 261, the author, James W.

Simonton clearly points out the distinction between an incorporeal right, and the enjoyment or use of that right. The owner may never use nor enjoy the right, yet he cannot thereby lose it. The right continues in existence, and acts on the part of the servient owner which would interfere with the enjoyment or use, if the dominant owner should want to use or enjoy the right, for no matter how long the interference may endure, do not work an abandonment of the right itself. Some affirmative act on the part of the owner is necessary for that result to obtain.

Where a power company flooded land and paid compensation to the surface owner, it was held that the owner of 5/6 of the minerals underneath, never having been compensated for loss of access to his minerals, and although he acquired ownership of the minerals after the land was flooded, was nonetheless entitled to compensation.

> "Defendant contends that it has acquired and can acquire no easement from plaintiffs as owners of mineral rights in the land * * *. The easement of defendant to flood the lands is a burden not only upon the rights of the owner of the surface but also upon the incorporeal hereditament of access belonging to the owners of the mineral rights. This easement of the owners of the mineral rights may no more be taken from them or its value be impaired without just compensation than the rights of the owner of the surface may be taken from him * * *. Closely analogous to the rights of the plaintiffs here is the right of one who has an easement of access over a street or alleyway to recover for deprivation of that right."
>
> *Duke Power Co. v. Tones* (C. C. A. 4th), 118 F. (2d) 443, 447.

There can be no explanation of the findings of the District Judge except that he was determining loss to appellants caused by the extent of enjoyment of the profit à predre so taken and condemned, rather than loss to the appellants by reason of the taking, as contradistinguished from the use.

To perhaps more clearly point this out, suppose the case had come before the Court on October 18, 1939, instead of November 16, 1943. Suppose then the District Judge had no idea the rock slide would occur, and no limitation was placed on the extent to which respondent would thereafter enjoy the profit à prendre, so taken and condemned. Could he have justly speculated as to the extent respondent would enjoy the right, and compensated appellants to that limited extent? And had his estimate been low, and the enjoyment thereafter exceeded his estimate, could he have granted appellants additional compensation to make the total compensation "just"?

And, by the same token, had appellants offered their land for sale as a dredge mining project to Mr. Bishop or Mr. Smith for $12,000 on October 18, 1939, would they have accepted the offer and purchased for that figure? By no means. They would have replied "The United States has the right to take gravel and gold for two years. In that time they can denude the property of gold. They have taken its only value. I am not interested."

Thus, when the District Judge found

> "That defendants have suffered no pecuniary loss over and above the use and occupancy * * *"
>
> (T. R. p. 87.)

he completely forgot that defendants were legally injured to the extent of the entire value of their property as dredge mining property for a year and a half. And for this injury he found and gave no compensation.

When a declaration of taking is filed, taking the fee except for road easements, this is broad enough to cover and include an easement of drainage over the land taken, an appurtenance to an adjoining cemetery. An amendment to the declaration of taking cannot revest the easement in the cemetery. And, having taken the easement, the government must pay just compensation to the cemetery for the easement.

United States v. Sunset Cemetery, 132 F. (2d) 163.

So, having taken and condemned from appellants a profit à prendre, respondent cannot, by non-enjoyment, revest the right taken and avoid compensation to appellants.

UNDER RULES FOR DETERMINATION OF VALUE, APPELLANTS WERE ENTITLED TO SUBSTANTIAL COMPENSATION FOR THE PROFIT A PRENDRE TAKEN, APPRAISED AND FIXED AS OF OCTOBER 17, 1939.

Appellants' claims may be thus summarized: On October 17, 1939, they were to all intents and purposes the owners of the fee in a parcel of land. On that date respondent impressed on appellants' land a profit à prendre, in the full exercise of which, without violating any restrictions placed on that right, respondent could have entered upon appellants' land and in the process

of removing gravel, removed gold of an established value of $182,735 and retained both gravel and gold.

> "The just compensation to be paid the land owner turns upon the question of the effect the enjoyment of the easement to its fullest extent will have upon the cash market value of the property upon which the easement is imposed. Under either rule, whether the loss to the owner is to be paid for as damages inflicted by the imposition of an easement or by way of just compensation for the thing taken, the result should be the same if the market value of the property before and after the imposition or taking is used as the measure of loss or damage. The question is, how does the easement affect the market price of the property * * *. Specifically if the imposed easements leave the property less marketable because as to some of it the owner of the fee or servient estate cannot use it at all or cannot use it as effectively or profitably, the Commission will, from the material facts before it, determine the extent to which the inability to use the property upon which the easement is imposed at all or in parts, affects the fair cash market price of the whole. The adverse effect upon the market price, that is, the amount the imposition of the easement has reduced it, will constitute the just compensation due the owner."
>
> *United States v. Indian Creek Marble Company,* 40 F. Supp. 811, 821.

That profit à prendre, so taken and condemned by respondent, must be valued as of October 17, 1939, the date of taking.

> *Olson v. United States,* 292 U. S. 246, 78 L. Ed. 1236, 54 S. Ct. 704;

United States v. Klamath and Modoc Tribes, 304 U. S. 119, 82 L. Ed. 1219, 58 S. Ct. 799;
Danforth v. United States, 308 U. S. 271, 84 L. Ed. 240, 60 S. Ct. 231;
United States v. Miller, 317 U. S. 369, 87 L. Ed. 336, 63 S. Ct. 276.

The test of value of a profit à prendre is not the value of the fee itself. It is the value of the right taken, which, of course, cannot exceed the value of the fee. This can be reached by determining what, if anything, is left to the landowner. Thus, when land has no value except for surface rights, the taking of an easement to pass over amounts to a taking of the fee, and is valued the same. And if the taking of a profit à prendre, as respondent has so taken and condemned here, amounts to the power and privilege of extracting the full value of the fee, there is no reason why it should not be so valued.

> "After all, the intent of the Fifth Amendment to the Constitution is that while the government has power, with practically no limitation, to take property, nevertheless, the owner is to be treated fairly and his rights maintained. It is the duty of a court to attempt as nearly as possible to put the owner in as good a place as he was before the taking. In my opinion he is entitled to receive a definite fixed payment representing the value of this property at the time of the taking. If this taking be of a fee simple title the rules under which to ascertain the compensation are well fixed and known. See particularly United States v. Miller, supra. On the other hand, if the estate is anything less, then it is a question of fact for the jury to

give due consideration to what, if anything, is left to the landowner, and when it has found the value of that it should be deducted from the full value of the fee simple title. This to me more nearly approaches a definition of just compensation and fair dealing with an owner than any other suggestions that have been made.

It may be suggested that the government should not be put to the jeopardy and risk of a finding which might be in part speculative because of the uncertainty of all the conditions surrounding the taking of the property. The same argument applies with equal force to the owner. And since it is the government which has determined the estate in and manner of taking, if either party is to run the risk of a loss because of changes in the future, it would seem to be just that this be assumed by the party who is in control of and has determined the status of the case."

United States v. 9.94 Acres, 51 F. Supp. 478, 485.

Compensation must be awarded in the action immediately. The trial Court has no right to postpone the determination of the case in order to determine what, if any, actual loss may be suffered by the land owner.

"I cannot believe that the constitutional guarantee that no man's property could be taken without just compensation has any such meaning and that the owners of the property may be forced into receiving annual stipends. Just compensation in my opinion means exactly what it says, and it means that the owner himself is entitled to receive his compensation; not that his estate or his

children or his grandchildren are to receive installment payments and perhaps inherit a law suit in the far future."

United States v. 9.94 Acres, 51 F. Supp. 478, 483, 484.

"It is contended that no present detriment warrants present assessment of damages, inasmuch as the government is obligated to eventually return the property, subject to wear and tear, in its condition at the time of taking.

But by taking this special or particular type or interest in defendant's hotel property, the government cannot defer payment for the damage, or interest taken, to a later period. Nor can it force defendant, if it chooses, to again litigate its right to compensation in another forum.

Compensation should be determined by the jury in this proceeding. It has been frequently held that the compensation for the taking of property must be awarded in the condemnation proceeding itself. In East Bay Municipal Utility District v. Lodi, 120 Cal. App. 740, at page 762, the Court said: 'The law seems to be quite uniform that in eminent domain proceedings the damages must be assessed once and for all, and must include all the damages that might be inflicted by the condemning party.' Id. Sternes v. Sutter Butte Canal Co., 61 Cal. App. 737.

The government says it is obligated to and will return the hotel to the defendant in the same condition as received, wear and tear excepted, when it finally determines to end the lease. But 'just compensation' does not mean a promise, howsoever well intentioned, to perform an act in the future. The owners of the hotel are entitled to

compensation for the taking, not their heirs in years to come, and then mayhap, after litigation in the Court of Claims, if there be one at the time. What would really happen if this theory were adopted would be, as stated by Judge Waring in U.S. v. 9.94 acres, supra, that condemnation cases would be tried piecemeal—a part of the compensation awarded now and a part years hence and then maybe only after new litigation.

It is claimed by plaintiff that evaluation of the damage or loss suffered by defendant due to the use to which the property is being put, and for which it was taken, is too speculative. The government, however, has determined the nature of the estate or interest taken and it likewise will determine the length of tenure. Therefore it is just that, if there be any uncertainty arising as to the amount of compensation, it cannot be advantaged by the plaintiff. Furthermore, mere difficulty in assessing damages where the right to compensation is present, cannot be urged as a ground for denying compensation. 'Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.' Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 379. See also Palmer v. Connecticut Ry. Co., 311 U.S. 544, 560. It may well be that defendant will fare better to await a later day for the determination of its damage. Be that as it may, defendant demands that its comepnsation be fixed in this proceeding and I hold that it is so entitled."

United States v. 60,000 Square Feet, 53 F. Supp. 767, 770, 771.

Similarly when the United States condemned a lease under which lessee was required to restore the premises to the condition when the lease commenced, two years earlier, and thereby relieved the lessee of that obligation, it was held that the loss of that right to lessor required compensation to be paid at once.

United States v. Certain Parcels, 55 F. Supp. 257.

Where the United States took a lease for two years with an option for renewal for duration and one year, it was held to be an estate for years with perpetual renewal, or substantially the fee, and, since compensation was paid only for the two year lease, and not the privilege of renewal, Court struck declaration of taking from file and denied filing amended complaint, because original taking was until June 30, 1945, terminable earlier on 60 days' notice.

> "In the first place, just compensation for the acquisition of land taken without the consent of the landowners under eminent domain, requires payment by the sovereign of the full value of the entire interest appropriated. Second, in order to be just, compensation must be paid in full in the immediate condemnation suit * * *. Third, judgment in a condemnation case must confirm the passing of title to the United States and place the title to the compensation for the full interest taken in the landowner and thus, if the right of perpetual renewal is not paid for, the United States would not acquire that right, even if such a clause were inserted in the judgment."

United States v. Bauman, 56 F. Supp. 109, 114.

Where the taking consisted in flying low over land in the enjoyment of an airport which the United States had leased for a fixed period with an option to renew for a period as long as 25 years, and by reason thereof the landowner was unable to use his land as a chicken ranch, the purpose for which it was peculiarly adaptable, the Court refused to assess damages on the theory that the use was temporary, but assessed as if the taking continued for the maximum period.

Causby v. United States, 60 F. Supp. 751.

CONCLUSION.

Appellants owned land peculiarly adaptable to dredge mining and to no other use. From October 17, 1939 to September 13, 1941 respondent took and held a profit à prendre in that land, in the exercise of which respondent had the power and the privilege of taking everything of value and rendering appellants' land of no further use or value. For that period the interest in that land remaining in appellants was of no value.

Appellants are entitled to compensation for that right taken, to the value of that right at the time it was taken, and respondent cannot avoid payment with the answer that while it took and condemned the right, it never exercised it. Had compensation been fixed October 17, 1939, under the evidence appellants would have been entitled to $12,000. Their rights can be no less because the trial to fix and determine that

compensation was delayed until November 16, 1943, four years later.

The errors of the District Judge should therefore be corrected, and compensation paid accordingly.

Dated, Berkeley, California
December 14, 1945.

Respectfully submitted,
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Attorney for Appellants.